Supreme Court, U.S.
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No.99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION

ARGUMENT

1. The Circuit Conflict Over The Admiralty Law Standard For Abandonment Is Genuine And Substantial

Despite the fact that three different circuits, state courts and numerous legal scholars have recognized the fundamental conflict among the circuits regarding the admiralty law standard for abandonment, Respondents explain away the circuit conflict as a "fiction" manufactured by Petitioner. Respondents apparently propose that Petitioner's sway over the bench and bar is so mesmerizing that it has succeeded in beguiling not only a dozen different judges of various United States courts of appeals, but also the

Solicitor General of the United States; Attorney Generals for *amici curiae* states from West to East Coasts, from North to South; learned scholars and publications in law, archaeology and history in the U.S. and abroad; and even *amici* the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, the Society for American Archaeology, the National Association of Academies of Science, the Advisory Council on Underwater Archaeology, the North American Society for Oceanic History, the Society for Historical Archaeology, the Council of American Maritime Museums and the National Maritime Historical Society—all of whom have recognized the split among the circuits.

The division among the circuits is real and profound. Contrary to Respondents' assertion, the Ninth and Sixth Circuits, in addition to the Fourth Circuit,[1] have recognized the split. All told, twelve judges of the courts of appeals have implicitly or explicitly entreated the Court for guidance or otherwise recognized the circuit split, and not a single circuit or district judge has stated the contrary. Although Respondents protest that none of the cases recognizing the circuit split involved claims derived from an "owner," exactly the opposite is true.[2] The circuits are hopelessly split

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[1] Judge Widener is not, as Respondents suggest, the only judge in the Fourth Circuit who has identified the circuit split. Two other judges of that circuit joined in his unanimous opinion below. Moreover, five Fourth Circuit judges (including two of the original panel members) voted for rehearing en banc of the 1992 opinion on abandonment.

[2] *See Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379 (9th Cir. 1996) (claim by salvor purchasing rights from alleged subrogated insurance company); *Fairport International*

regarding the admiralty standard for abandonment, the definition of abandonment, the applicable burdens of proof and the role of technology.

2. The Issue Of The Admiralty Law Standard For Abandonment Is Neither Precluded By The Law Of The Case Doctrine Nor Moot

The "law of the case" doctrine has no application where, as here, an issue decided below is addressed to a higher authority. The Court's 1993 denial of certiorari on an interlocutory basis presents no bar now that a final judgment has been rendered in the dispute between Columbus-America and the insurance claimants. *See e.g. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58

Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al., 105 F.3d 1078 (6th Cir. 1997) (claim by salvor purchasing from purported original owner*); The People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E. 2d 141 (Ill. App. 1997), *rev'd*, 710 N.E.2d 820 (Ill. 1999) (claim by insurer and salvor claiming through insurer*); Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999) (claim by Spain).); *Columbus-America v. Atlantic Mutual, et al.*, 203 F.3d 291 (4th Cir. 2000) (claim by insurance companies asserting succession by subrogation.) (In quoting the Fourth Circuit's 1992 observation that, for an ancient shipwreck "a court may infer abandonment," Opp. Brief 2, Respondents omit the court of appeals' very next remark: "Such an inference would be improper, though, should a previous owner appear and assert his ownership interest...." Pet. App. 60a). *Cf. Yukon Recovery v. Ocean Mar, Inc., cert. pending* No. 99-1958 (claim by salvor claiming through insurer).

(1916).[3]

The doctrine of mootness also has no application to this ongoing *in rem* proceeding. In admiralty actions *in rem*, the entire world is a party to the proceeding, *California v. Deep Sea Research*, 523 U.S. 491, 118 S. Ct. 1464, 1470 (1998), *quoting United States v. Bright*, 24 F. Cas. 1232, 1236, No. 14,647 (CC Pa. 1809), and each time Columbus-America makes a recovery in the future, it will be required to adjudicate its rights in the recovery—including whether each item is "abandoned." Abandonment will be a recurrent issue in the proceeding for many years to come, see Pet. App. 21a, and accordingly is not moot. *See e.g. Carroll v. Resident and Commissioners of Princess Anne*, 393 U.S. 175, 178-79 (1968); *Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982); *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Even *arguendo* leaving aside the ongoing issue of title to future recoveries, and focusing solely on the "quarrel between Columbus-America and the Underwriters," the issue is not moot because abandonment goes to a core issue below—the remedy for the district court's amendment of the conditional settlement agreement. "Having found that...the district court erred in altering the parties' Settlement Agreement," the court of appeals was required to fashion a remedy for the amendment, Pet. App. 17a, 19a, 22a; by its express terms, such failure of a condition rendered the agreement itself "null, void and of no effect." Pet. App. 11a. On this issue, the crux of the decision below was that the absence of guidance on the standard for abandonment from a higher authority prevented the court of appeals from

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[3] Ironically, in 1993, the absence of a final judgment was the key ground interposed by Respondents as barring *certiorari* review of the Fourth Circuit's express abandonment rule.

accepting Columbus-America's proposed remedy for the amendment—a finding of abandonment of the past recoveries—and permitted only an alternative remedy. Pet. App. 28a. This Petition seeks such guidance from a higher authority, which would reverse the remedy granted below.

Respondents' reference to the "acceptance of benefits" doctrine[4] has no application to this or any other case where the adequacy of the amount of the judgment is at stake, where the appellant would be entitled to the "benefit" irrespective of the outcome of the appeal, or where the issue appealed differs from the issue determining the "benefit." *See U.S. v. Hougham*, 364 U.S. 310, 312 (1960); *Embry v. Palmer*, 107 U.S. 3, 8 (1882); *Reynes v. Dumont*, 130 U.S. 354, 394 (1889); *United States v. Dashiel*, 70 U.S. 689, 703 (1865).[5] Columbus-

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[4] In the proceedings below, Respondents initially argued the precise opposite of their current position, i.e. that, as a matter of law, Columbus-America's sale could not render the issues moot or otherwise oust the court's jurisdiction, Response to Columbus-America's Motion For Expedited Ruling on Appeal 5-8 (2/3/00), *citing Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 84-89 (1992), and the court of appeals agreed. Respondents then reversed their position, arguing unsuccessfully below that the sale had made the case moot. Respondents then switched back to their original position in a letter to Petitioner on June 20, 2000, stating that Respondents themselves "will be filing a cross-petition for *certiorari*." Respondents' claim of mootness in their Brief in Opposition simply reflects their latest flip-flop.

[5] In what is now hornbook law, state supreme and lower courts throughout the land are in accord with the Court's precedents rejecting the acceptance of benefits theory under these circumstances. *See generally* 5 Am Jur. 2d *Appellate Review* § 631 *et seq., and cases cited therein.*

America's right to 92.4% of the treasure was undisputed by the Underwriters in the proceeding below (they failed to perfect a cross-appeal, nor have they filed a cross-petition for *certiorari*), and Columbus-America received the salvage award in 1995 independently of its position on abandonment. Since that time, because of the Underwriters' failure to cross-appeal and contest that award, the only possible alternative outcome of further proceedings could be to increase Columbus-America's share of the treasure to 100%.

3. The Court's Action To Resolve The Circuit Conflict Is Important To The Efficacy Of The Abandoned Shipwreck Act, The Development Of Admiralty Law, And The Progress Of High Technology Maritime Exploration

Respondents mistakenly assume that federal and state stewardship of abandoned shipwrecks under the ASA is inconsistent with deep-sea exploration outside the territorial waters of the United States. The purpose of the Abandoned Shipwreck Act is not, as Respondents imply, to preclude exploration, but rather to ensure that exploration takes place in a responsible way. 43 U.S.C. § 2103. Entirely consistent with deep-sea exploration are the ASA's provisions for a cooperative effort among public and private sectors to explore and preserve our nation's underwater cultural heritage. *See id.* The only private explorations threatened by the ASA are the methods typically used by the Respondents, known as "smash and grab" salvage because of their practice of smashing into shipwrecks, indiscriminately grabbing for the valuables aboard with crude grabbing arms, and in the process destroying the scientific, historic and archaeological values of the shipwrecks. (Tr. 93 974-80) (former salvage manager for Respondents). The existing uncertainty over the admiralty law standard for abandonment provides no public benefit, and

favors only those who, through obfuscation, seek to advance their own interest at the expense of the public good. Resolution of the conflict among the circuits falls squarely within the Court's constitutional role in the development of the law maritime.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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